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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 212

MOSES LAKE HOMES, INC., ET AL., *Petitioners*

vs.

GRANT COUNTY, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH COURT

PETITION FOR REHEARING

PAUL A. KLASEN, JR.
Prosecuting Attorney
Grant County, Washington

FELIX & ABEL and
JENNINGS P. FELIX
Special Counsel

Attorneys for Respondent
Grant County, Washington

2307 Northern Life Tower
Seattle 1, Washington

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INDEX

TABLE OF CASES

TEXTBOOKS

CONSTITUTION

STATUTES

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Supreme Court of the United States

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PETITION FOR REHEARING

I.

THERE IS A COMPLETE LACK OF EVIDENCE TO SUPPORT THE COURT'S FINDING OF DISCRIMINATION

The opinion of the Court assumes that Grant County has valued Petitioner's leaseholds higher than other leaseholds in Grant County. This Grant County denies. There is no such allegation in the pleadings and no evidence in support of such a conclusion.

The Circuit Court did not attempt to "assess taxes" or instruct the District Court to do so (Slipsheet p. 8). The Petitioners were merely permitted to supply, if they could, the deficiencies in their proof. No trial occurred. The only evidence presented were the allegations of the Pleadings, plus the demands for admissions by each party, many of which were denied (Tr. 88, 94,

100, 104). Courts, and particularly this Court, should not be asked to base decisions upon surmise and conjecture as to what the evidence might show.

If, in order to decide this case, we must speculate, we submit that the only evidence of value before the Court is that Grant County assessed the property far *lower* than it should have. Section 84.40.030 of the Revised Code of Washington and the 17th Amendment to the Washington Constitution require that all property shall be assessed 50% of its fair value. A comparison of assessed values to the mortgages demonstrates the fallacy of assuming that the amount of the mortgage loans were included in the assessment of valuation. As the Court apparently concludes these are F.H.A. insured loans (Tr. 81) and the loan, by 12 U.S.C.A. § 1713(c) (2) (P. Supp.) may not exceed 90% of the value of the property. 90% is the maximum loan-to-value ratio, 12 U.S.C.A. § 1709(a) (P. Supp.).

Lessee	Value	Loan	Actual Value if Loan-to Value Ratio is 90%
Moses Lake Homes, Inc.	$500,000 (Tr. 128)	$3,236,000 (Tr. 89)	$3,595,555
Larsonaire Homes, Inc.	$100,000 (Tr. 121)	$1,782,000 (Tr. 89)	$1,980,000
Larson Heights Inc.	$100,000 (Tr. 128)	$1,600,000 (Tr. 89)	$1,777,777

An instrumentality of the United States has already determined the actual value of these properties to be not less than the figures in the right column above. The mortgage amounts have been, of course, diminished by payments, the amount of which we do not know. Thus,

if, the Petitioners received maximum loans, Moses Lake Homes, Inc. was either assessed at 14% of its full value; Larsonaire Homes, Inc. at approximately 5%; and Larson Heights, Inc. at approximately 6% of its value. This was either in violation of Washington law or the assessor *did consider the benefits and burdens contrary to the assumption of the Court.* If discrimination existed, it appears to be in favor of rather than against these Petitioners. Further, if the loan-to-value ratio were less than 90%, the actual value of the property would be higher.

Remember, these assessments were "Default Assessments," made by the assessor because the Petitioners refused, in violation of law, to list and value their property as required by Sections 84.40.180 and 84.40.200 of the Revised Code of Washington. The Petitioners submitted nothing to the assessor to permit him to accurately determine valuation. They did not question his valuation before the County Board of Equalization pursuant to Section 84.48.020 of the Revised Code of Washington. They did not allege over-valuation, excessiveness of tax or discrimination in the Federal District Court, and they have presented no evidence that the assessed valuation is not the true valuation. Petitioners, in what would be their "Complaint," allege only that this property had never been assessed or levied upon (see para. 4 of the Petitioners for the Payment of Money, Tr. 66, 67-69, 70-71). If discriminatory valuation had been alleged in the trial court, Grant County, even though the burden of proof was not upon it, would have at least had the opportunity to meet these factual

issues. Discriminatory taxation was not raised by Petitioners either in their Specifications of Error in their Opening Brief (p. 8) in the Circuit Court or in their briefs as Cross-Appellees. With all respect, we submit Justice is ill-served when a taxpayer can profit by his unlawful refusal to list and value his property and win a lawsuit by his failure to allege and to prove the facts necessary to recovery.

The Circuit Court gave the Petitioners the opportunity to prove that the default assessment was excessive. Grant County did not seek Certiorari because it is confident that trial on the merits would demonstrate that the assessment is neither excessive nor discriminatory.

II.

DOES WASHINGTON DISCRIMINATE AGAINST FEDERAL LESSEES?

This Court finds that the Washington Court would discriminate against Wherry Act leaseholds because the opinion of the Washington Court in *Moses Lake Homes, Inc. v. Grant County*, 51 Wn.(2d) 285, 317 P. (2d) 1069 (1957) does not discuss the *Metropolitan* case, cited at p. 6 of the slipsheet opinion. Our contention before that Court and here was that the *Metropolitan* cases were not applicable because in those cases, the improvements would last beyond the length of the lease. In fact, in those cases, many of the improvements had been constructed prior to the lease. In the case before us, the improvements were placed upon the property by

the lessee after the lease began and would be gone when the landlord received the property back.

This, we submitted, is quite an obvious and important difference — it is the identical factor that this Court relied upon in *Offutt Housing Co. v. Sarpy County*, 351 U.S. 253, 100 L.ed.1151 (1955). The State decision is a clear mandate to the Washington taxing officials to assess all similar leases, whether governmental or private, in a like manner.

In the absence of clear language of the Washington Supreme Court that it was oblivious to the unconstitutional discrimination that this Court finds obvious, we suggest that both accuracy and propriety require this Court to instruct or request the Washington Court to clarify its position. Discrimination should not be easily presumed.

If any inconsistency exists between two decisions of the same court, the older case must be held be to be overruled by the later, *Puget Mill v. Kerry*, 183 Wash. 542 at 559, 49 P.(2d) 57 (1935) and see also 14 Am. Jur. 283.

On *Wells v. City of Savannah*, 181 U.S. 531, 45 L.ed. 986 (1901), private persons had purchased perpetual leaseholds from the City of Savannah, Georgia, in 1790. The City attempted to tax the property by ordinance of 1878. This Court quoted with approval the opinion of the Georgia Supreme Court as follows:

> "The value of property consists in its use, and he who owns the use forever, though it be on condition subsquent, is the true owner of the property for the time being. This holds equally of a city lot or of all the land in the world. Where taxation is *ad valor-*

em values are the ultimate objects of taxation, and they to whom the values belong should pay the taxes.

* * *

"The corporeal property in such a case is at the direct risk of the purchaser; he alone sustains the losses of deprecation in value, and he alone takes the benefit of appreciation. The vendor risks only the fixed rent or the fixed purchase money, and neither of these will ever become more or less by anything which may happen to the premises. Only his security, not his property, will be affected thereby."

The importance of the *Wells* decision is that it involved leasehold property taxed at full value and that it was cited and relied upon by the Washington Court which quoted extensively from the Georgia Supreme Court opinion, as did this Court, in *Washington Iron Works Co. v. King County,* 20 Wash. 150, 54 Pac. 1004 (1898), the Washington Court stated:

"Tidelands held under contracts of purchase such as appellant had, are in the possession, use, occupation and enjoyment of private owners. They are no longer a part of the public domain of the state, but have been segregated from it. In equity, appellants are the owners, possessing a real and substantial interest, which they can assign, transfer and dispose of as they choose; and the state cannot deprive them of this right. The term 'property', as applied to land, comprehends every species of title, inchoate or complete. It is sufficient to embrace those rights which are executory as well as those which are executed: *Soulard vs. U.S.,* 4 Pet. 511, *Puget Sound Agricultural Co. vs. Pierce County,* 1 Wash. T. 159. The taxing power reaches

everything within the state which can be denominated property. It may be made to embrace all equitable credits of whatever description they may be. *Carroll vs. Perry*, 4 McLean 25. The naked legal title is in the state, but for one purpose only — to secure the unpaid purchase price, *Townsen vs. Wilson*, 9 Pa.St. 270. The interest of the state is that of an equitable mortgagee."

The Court then stated at 20 Wash. 154:

"Relatively to the question of taxation, it makes no substantial difference whether the estate or property of *beneficial* owners be classed as realty or personalty; whatever property of either kind belongs to them is taxable *ad valorem*." (Emphasis supplied)

"Substantially the same views are expressed in *Stockdale v. Treasurer*, 12 Iowa 536; *Logan v. Commissioners*, 51 Kansas 747 (33 Pac.603); *Edgington v. Cook*, 32 Nebraska 551 (49 N.W.369); *Prescott v. Beattie*, 17 Kansas 320; *Oswald v. Hallowell*, 50 Kansas 154."

In *Rabel v. Seattle*, 44 Wash. 482, 87 Pac. 520 (1906); and *Trimble v. Seattle*, 64 Wash. 102 Pac. 647 (1911) affirmed 231 U.S. 683, 58 L.ed. 435, (and see the annotations in 23 A.L.R. 248); the Washington Court held that the leasehold interest of a lessee of state property was taxable to the full value of the local improvement insofar as the leasehold is benefitted by the improvement.

The *Rabel, Trimble* and *Washington Iron Works* cases are the natural precursors of the State Court decision in *Moses Lake*. See also 3 Cooley on Taxation, § 1157 (1924).

> "Improvements removable by the tenant at the end of the term are taxable to him and not the landlord." 2 Cooley on Taxation, § 593, p. 1268.

Why should improvements completely used up by the tenant before the end of the term be treated differently.

If our analysis of Washington tax law be questioned, we would submit that *Moses Lake* is so obtuse that this Court should certify the issue to them for decision.

III.

RES JUDICATA

The opinion of this Court states (slip sheet pp. 8-9):

> "Nor is there any merit in respondent's contention that the opinion and judgment of the Supreme Court of Washington in the *Moses Lake* case, *supra*, is *res judicata* of the County's tax claims against the Moses Lake leasehold for at least the years 1955 and 1956. This is so because no tax whatever had then been assessed and levied against the Moses Lake leasehold, and hence no issue of discrimination was or could have been presented and adjudicated in that case."

The validity of the 1955 taxes (and taxes for "all subsequent years") was the *specific issue* in the *Moses Lake* case.

That action was brought by this Petitioner, Moses Lake Homes, Inc., against this Respondent, Grant County, to enjoin the levy and collection of *1955 taxes* and taxes for all subsequent years upon this property, on the grounds that the tax offended the Federal Constitution. Whether the tax was against the leasehold or the improvements themselves make no difference—it was

the very tax involved herein. *Res judicata* is a rule of substantive law and applies to both federal and state taxes. In *Tait v. Western Maryland R.Co.*, 289 U.S. 620 at 624, 77 L.ed. 1405 at 1408 (1933) this Court stated:

> "This court has repeatedly applied the doctrine of *res judicata* in actions concerning state taxes, holding the parties concluded in a suit for one year's tax as to the right or question adjudicated by a former judgment respecting the tax of an earlier year. [citing cases]"

The doctrine applies to issues which were and which could have been litigated. *Res judicata* does not become inapplicable because a different argument or theory is advanced in the subsequent case, *Lenninger v. C.I.R.*, 86 F.(2d) 791 (6 Cir. 1936) affirming 29 B.T.A. 874 (1934).

CONCLUSION

I.

The Court has erred in assuming, without evidence, that a fact is true. The very least that should be required of one who asserts discrimination is that he prove it by competent evidence. He should not gain a profit because he refused to obey state tax laws.

II.

This Court disagrees with what we consider the correct analysis of Washington tax law and the State Court's opinion in the *Moses Lake*. We presented the matter to that Court and feel our conclusions to be more accurate. However, it is clear that the opinion is unclear. The citizens of Grant County should not be penalized because of a lack of clarity. In such a case, the fair

thing to do is certify the question to the Court to which the decision belongs. Procedural limitations, if any, should not bar the effort to obtain a truly correct decision on Washington law.

III.

The issue of the validity of the 1955 taxes was conclusively determined by the State Court judgment even though that judgment may have been in error. The Petitioners also specifically placed in issue before the State Court the validity of the taxes "for all subsequent years." This Court, by collateral attack, reversed the Washington Court's judgment. We submit this is manifestly improper unless this Court is to overrule all those of its previous decisions upholding the *res judicata* as a rule of law.

Respectfully submitted,

JENNINGS P. FELIX

Special Counsel for Grant County

CERTIFICATE

I, Jennings P. Felix, of counsel for Respondent, Grant County, Washington, do hereby certify, pursuant to Supreme Court Rule 58, that I am a member of the Bar of this Court and that this Petition for Rehearing is presented in good faith and not for delay.

JENNINGS P. FELIX,
Of Counsel for Grant County

SUPREME COURT OF THE UNITED STATES

No. 212.—October Term, 1960.

Moses Lake Homes, Inc., Larsonaire Homes, Inc., and Larson Heights, Inc., Petitioners, v. Grant County.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[April 17, 1961.]

Mr. Justice Whittaker delivered the opinion of the Court.

Among their various contentions, petitioners sought our writ of certiorari on the ground that, although finding that the State of Washington had discriminatorily, and therefore unconstitutionally, valued and taxed their federal-Wherry Act leaseholds, the Court of Appeals for the Ninth Circuit, nevertheless, sustained and enforced those taxes. 264 F. 2d 502. We granted the writ, limited to that question. 364 U. S. 814. Understanding of our decision will require a brief statement of the relevant facts of the case.

Acting pursuant to the provisions of §§ 801 to 809 of Title VIII of the National Housing Act (12 U. S. C. (1958 ed.) §§ 1748, 1748a to h–1), the Secretary of the Air Force, on behalf of the United States, entered into a separate lease, with each of Moses Lake Homes, Inc., Larsonaire Homes, Inc., and Larson Heights, Inc., Washington corporations, demising, in each instance, a particularly described tract of land, within the Larson Air Force Base in Grant County, Washington, for a term of 75 years, unless sooner terminated by the Government,

for use as a housing project at a nominal rental of $100 per year.[1]

The leases were on the same form, and each bound the lessee to erect on its leasehold a described housing project, and to maintain and operate it throughout the life of the lease. Each lease contemplated and provided that the lessee would raise the money necessary to construct the project by an F. H. A. insured mortgage loan on its leasehold and the improvements, to be serviced and amortized by the lessee out of its rents from the housing units, which were to be rented at such rates and to such military and civilian personnel as the Commanding Officer of the air base might designate. The leases further provided that the buildings and improvements, "as completed," would become the property of the United States and so remain, regardless of any termination of the lease, without further compensation to the lessee.

With the proceeds of F. H. A. insured mortgage loans on their respective leaseholds and the improvements, aggregating more than $6,000,000, the lessees erected the respective housing projects and undertook their management and operation as agreed in the leases.

In June 1954, the Grant County assessor placed the Moses Lake leasehold on his assessment list for taxation in the year 1955, but he did not then levy any tax against it. Moses Lake promptly sued for and obtained a decree in the Superior Court of the State enjoining the County from levying *any taxes* on its leasehold for the year 1955 and thereafter. Upon the County's appeal, the Supreme Court of Washington reversed on November 14, 1957, holding that the leasehold was taxable by the County, and further holding, upon its understanding of our opinion in *Offutt Housing Co.* v. *Sarpy County*, 351 U. S. 253,

[1] The Moses Lake Lease was entered into on May 31, 1950, the Larsonaire lease on August 6, 1953, and the Larson Heights lease on August 2, 1954.

that it would be proper, for such purpose, to value the leasehold at "the full value of the buildings and improvements" thereon. *Moses Lake Homes, Inc.*, v. *Grant County*, 51 Wash. 2d 285, 287.

Thereafter, in December 1957, the County valued these Wherry Act leaseholds on the basis of the full value of the buildings and improvements, and, acting under § 84.40.080, Revised Code of Washington, retrospectively assessed its taxes against the Moses Lake leasehold for the years 1955 through 1958, against the Larsonaire leasehold for the years 1956 through 1958, and against the Larson Heights leasehold for the years 1957 and 1958 as "omitted property" as authorized by that section.[2] Later, the County assessed and levied its taxes against the leaseholds, on the same basis, for the year 1959.[3]

On January 21, 1958, the County issued its distraints, and also its notices of sales of these leaseholds and the improvements thereon to be held on March 4, 1958, to satisfy its tax demands. Very soon thereafter, the United States instituted this condemnation action in the United States District Court for the Eastern District of Washington against the lessees and Grant County; and on March 1, 1958, it filed therein its declaration of taking, and took, these leasehold estates—depositing in the regis-

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[2] Section 84.40.080 of the Revised Code of Washington provides, in relevant part, as follows:

"The assessor . . . shall enter in the detail and assessment list of the current year any property shown to have been omitted from the assessment list of any preceding year, at the valuation of that year, or if not then valued, at such valuation as the assessor shall determine from the preceding year. . . . When such an assessment is made, the taxes levied thereon may be paid within one year of the due date of the taxes for the year in which the assessment is made without penalty or interest."

[3] The County's tax claims against petitioners' leaseholds were as follows: Moses Lake, $142,285.73, Larsonaire, $68,838, and Larson Heights, $47,088.

try of the court $253,000 as their estimated value[4]—and thereupon, on motion of the United States, the court enjoined Grant County from proceeding with its tax sales pending final determination of the case.

By its answer, the County claimed, and asked the court to award it, the greater part of the deposit to satisfy its tax demands.[5] The lessees disputed the County's claim, contending, *inter alia*, that the asserted taxes were invalid because discriminatorily assessed in violation of § 511 of the Housing Act of 1956 (70 Stat. 1091, c. 1029, 42 U. S. C. (1958 ed.) § 1594, note) and in violation of the United States Constitution. That issue, among others, was litigated between those parties as adversary codefendants.

Although the District Court found that Washington's "taxes and assessments on Wherry housing [leaseholds] are . . . levied upon a basis different and higher than [other leaseholds]," it, nevertheless, held that, but for the state court injunction, the 1955 and 1956 taxes against the Moses Lake leasehold would have been validly assessed and levied before the effective period of § 511 of the Housing Act of 1956 (June 15, 1956),[6] and

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[4] The deposited sum of $253,000 was allocated among the three petitioners as follows: Moses Lake, $126,500; Larsonaire, $65,300, and Larson Heights, $61,200. Thus, the County's claims against the Moses Lake and Larsonaire leaseholders were greater than the amount deposited by the United States as their reasonable value. See note 3. Had the County been successful on all items of its claim, it would have received all but $14,112 of the deposited sum.

[5] See note 4.

[6] Section 408, as amended by § 511 of the Housing Act of 1956 (70 Stat. 1091, c. 1029, 42 U. S. C. (1958 ed.) § 1594, note) contains the following relevant provision:

". . . Nothing contained in the provisions of Title VIII of the National Housing Act in effect prior to August 11, 1955, or any related provision of law, shall be construed to exempt from State or local taxes or assessments the interest of a lessee from the Federal

it allowed those items of the County's claim; but it denied all other items of the claim. On appeal, the Ninth Circuit "sustained [the District] Court's finding that the method used in assessing the Moses Lake leaseholds resulted in a higher tax than would have been true in the case of a non-Wherry Act leasehold," 276 F. 2d, at 847, but it held that "the fact that the taxes are higher does not invalidate the entire tax. It only requires that the amount collectible be reduced to what it would have been if the tax had been levied on a non-Wherry Act leasehold basis," 276 F. 2d, at 847, and—otherwise upholding the County's levies against the Moses Lake leasehold for the years 1955, 1956 and 1957—it remanded the case to the District Court to make the proper reduction in the amount of those taxes, and also for further proceedings respecting the other taxpayers and tax years involved, except it held that the 1959 taxes were invalid because levied on the leaseholds after the United States had acquired them.

In addition to the weight properly to be accorded to the conclusions of the two courts below that Washington imposes a higher tax on Wherry Act leaseholds than on other similar leaseholds, it is eminently clear that this is so. Section 84.40.030 of the Revised Code of Washington provides that all property shall be assessed at 50 percent of its fair value, and that "Taxable leasehold estates shall be valued at such price as they would bring at a fair, voluntary sale for cash." Consonant with that statute, the Washington Supreme Court has consistently held, save as to Wherry Act leaseholds, that all leaseholds,

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Government in or with respect to any property covered by a mortgage insured under such provisions of Title VIII: *Provided*, That no such taxes or assessments (not paid or encumbering such property or interest prior to June 15, 1956) on the interest of such lessee shall exceed the amount of taxes or assessments on other similar property of similar value. . . ."

including leaseholds on the State's own tax-exempt lands, are to be valued for tax purposes on the basis of their fair market value, considering their burdens as well as their benefits. *Metropolitan Building Co. v. King County*, 72 Wash. 47, 129 P. 883; *Metropolitan Building Co. v. King County*, 64 Wash. 615, 117 P. 495; *Metropolitan Building Co. v. King County*, 62 Wash. 409, 113 P. 1114. And see *Bellingham Community Hotel Co. v. Whatcom County*, 190 Wash. 609, 612-613, 70 P. 2d 301, 303, and *Dexter Horton Bldg. Co. v. King County*, 10 Wash. 2d 186, 116 P. 2d 507.

Even the facts of the *Metropolitan* cases are remarkably similar to the facts here. There the Metropolitan Company acquired a 50-year lease of land owned by the State. As required by the lease, the lessee erected very substantial improvements upon the land—funding their cost with a large issue of mortgage bonds—which improvements, immediately upon completion, became the property of the State. In the first of those cases, 62 Wash. 409, 113 P. 1114, the Court held that the leasehold should not be assessed at a "speculative" value, but at its "actual . . . value in money . . . ," and that it was error to assess it at the value of the improvements. In the two later *Metropolitan* cases (64 Wash. 615, 117 P. 495; 72 Wash. 47, 129 P. 883), the court emphasized that, in determining the fair market value of the leasehold, consideration must be given to its burdens, including mortgages upon it, as well as to its benefits.

Yet, without overruling or departing those cases with respect to state-created leaseholds, the Washington Supreme Court held in *Moses Lake Homes Co. v. Grant County*, 51 Wash. 2d 285, 317 P. 2d 1069, that Wherry Act leaseholds are taxable at "the full value of the buildings and improvements" thereon. It felt bound, as it said, to apply that special valuation rule to Wherry Act

leaseholds because of our opinion in *Offutt Housing Co.* v. *Sarpy County*, 351 U. S. 253. In this, the Washington Supreme Court mistakenly read and misapplied the *Offutt* case. Nothing in that case requires the states to assess Wherry Act leaseholds on the basis of the value of the improvements thereon. In this respect, it holds only that such a valuation is not unconstitutional *per se*. That case did not involve any issue or question of discrimination. It involved the law of Nebraska which requires *all leaseholds* in tax exempt property to be assessed at the full value of the buildings and improvements thereon, and the *Offutt* case held that such might constitutionally be done. It did not hold, as the Supreme Court of Washington has construed it in the *Moses Lake* case, that a State might constitutionally discriminate against leaseholds on federally owned lands in favor of leaseholds on state-owned lands.

If anything is settled in the law, it is that a State may not discriminate against the Federal Government or its lessees. See, *e. g.*, *Phillips Co.* v. *Dumas School District*, 361 U. S. 376; *United States* v. *City of Detroit*, 355 U. S. 466, 473; *City of Detroit* v. *Murray Corp.*, 355 U. S. 489. In *United States* v. *City of Detroit*, *supra*, we said:

> "It still remains true, as it has from the beginning, that a tax may be invalid even though it does not fall directly on the United States if it operates so as to discriminate against the Government or those with whom it deals." 355 U. S., at 473.

The *Dumas* case, *supra*, is closely in point and controlling. There the State of Texas taxed the leasehold estate of a government lessee at the "full value of the leased premises" (361 U. S., at 378), while it imposed "a distinctly lesser burden on similarly situated lessees of exempt property owned by the State and its political

subdivisions." 361 U. S., at 379. We there said, "[I]t does not seem too much to require that the State treat those who deal with the Government as well as it treats those with whom it deals itself," 361 U. S., at 385, and we held the tax to be void because it "discriminates unconstitutionally against the United States and its lessees." 361 U. S., at 379. That case is indistinguishable from this one on the point here.

The Court of Appeals was also in error in holding that "the fact that the taxes are higher does not invalidate the entire tax [but] only requires that the amount collectible be reduced to what it would have been if the tax had been levied on a non-Wherry Act leasehold basis" (276 F. 2d, at 847), and in remanding the case to the District Court to make the necessary adjustment. We held in the *Dumas* case, *supra*, that a discriminatory tax is void and "may not be exacted." 361 U. S., at 387. The effect of the Court's remand was to direct the District Court to decree a valid tax for the invalid one which the State had attempted to exact. The District Court has no power so to decree. Federal courts may not assess or levy taxes. Only the appropriate taxing officials of Grant County may assess and levy taxes on these leaseholds, and the federal courts may determine, within their jurisdiction, only whether the tax levied by those officials is or is not a valid one. When, as here, the tax is invalid, it "may not be exacted." *Phillips Co. v. Dumas School Distr.*, 361 U. S. 387.

Nor is there any merit in respondent's contention that the opinion and judgment of the Supreme Court of Washington in the *Moses Lake* case, *supra*, is *res judicata* of the County's tax claims against the Moses Lake leasehold for at least the years 1955 and 1956. This is so because no tax whatever had then been assessed and levied against the Moses Lake leasehold, and hence no issue of discrimi-

nation was or could have been presented and adjudicated in that case.

Inasmuch as the taxes, presently assessed and levied, discriminate unconstitutionally against the United States and its lessees, they are void, and hence may not be exacted.

Reversed.